No. 10390

In the United States Circuit Court of Appeals for the Ninth Circuit

AGNES C. JACOB, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SHIRLEY MAY JACOB, PETITIONER

v.

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BEVERLY JEAN JACOB, PETITIONER

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GWENDOLYN E. JACOB, PETITIONER

v.

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ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 66–102), reported in 47 B. T. A. 381.

JURISDICTION

These petitions for review (R. 103–112, 224) involve transferee liability of the taxpayers for federal income and excess profits taxes of Central Holding Company for the fiscal year ended June 30, 1938. On April 8, 1941, the Commissioner of Internal Revenue mailed to Agnes C. Jacob, Shirley May Jacob, Beverly Jean Jacob and Gwendolyn E. Jacob notice of transferee liability in the amounts of $4,901.30, $5,105.52, $5,105.52 and $5,105,52, respectively. (R. 92.) Within ninety days thereafter and on July 2, 1941, each of the taxpayers filed a petition with the Board of Tax Appeals for a redetermination of the aforesaid liabilities under the provisions of Section 272 of the Internal Revenue Code. (R. 3–19.) The decision of the Board of Tax Appeals sustaining the deficiency was entered October 2, 1942. (R. 102–103.) These cases[1] are brought to this Court by petitions for review filed December 28, 1942 (R. 103–112, 224), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code. As of October 22, 1942, by Section 504 of the Revenue Act of 1942, the name of the Board of Tax Appeals was changed to The Tax Court of the United States. Although the decisions of the Board were filed prior to that date, since the record was prepared subsequent thereto by the clerk of that tribunal he captioned the record "Upon Petitions to Review Decisions of the Tax Court of the United States."

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[1] An order of this Court dated March 2, 1943, consolidated the proceedings "for trial" and printing a "single consolidated record." (R. 220–221.)

QUESTIONS PRESENTED

1. The Board found that the taxpayers were owners of stock of a corporation which paid liquidating dividends to the taxpayers' agent who received the money for them. The payment of these dividends rendered the corporation insolvent. The corporation, which admittedly owes the taxes for which the taxpayers were assessed as transferees, was dissolved before they were assessed. Are these findings supported by substantial evidence? Are they sufficient to sustain transferee liability under Section 311 (a) (1) of the Revenue Act of 1936?

2. The Commissioner in 1939 refunded the income tax paid by the taxpayers on the liquidating dividends. In 1939, also, the Commissioner assessed Robert T. Jacob as transferee of the corporation on the ground of his receipt as his own of part of the same liquidating dividends for which these taxpayers were assessed as transferees. After appeal to the Board, a consent judgment was entered against Jacob. Does either the refund of the tax, or the assessment of Jacob estop the Commissioner or constitute an election? Is either *res judicata?*

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(f) *Further Deficiency Letters Restricted.*—If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (e) of this section relating to assertion of greater deficiencies before the Board, or in section 273 (c), relating to the making of jeopardy assessments.

* * * * *

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title.

* * * * *

STATEMENT

The facts as found by the Board of Tax Appeals, either in its findings of fact (R. 66–92) or its opinion (R. 92–102), may be summarized as follows:

The taxpayers are residents of Portland, Oregon. Agnes C. Jacob is the wife of Robert T. Jacob, and the other three taxpayers are their daughters. From April, 1921, until 1926 Robert T. Jacob was employed in the office of the Collector of Internal Revenue at Portland, Oregon. Since he began his practice of law in 1926, he has devoted a considerable portion of his time to handling income tax matters, and holds himself out as an expert in federal income tax law. (R. 68–69.)

In 1936, and for a period thereafter, Jacob had an office-sharing arrangement with another attorney, James L. Conley. In June, 1936, E. W. Barnes, a client of Conley, held a contract for the purchase of a hotel property known as the Welcome Hotel, located in Burns, Oregon, about 330 miles from Portland. Under the contract Barnes could acquire the hotel property for $18,000, subject, however, to state, county and city taxes of approximately $22,000. Barnes was unable to finance the purchase of the property and at Conley's suggestion discussed the matter with Jacob who arranged for a loan of $15,000 from Farrell, a client of Jacob's. Central Holding Company (hereinafter referred to as the corporation) was organized under the laws of Oregon on June 20, 1936. Farrell made the agreed loan of $15,000, taking a mortgage on the property as security, and Conley and Barnes borrowed $3,000 from Jacob to be applied on the purchase price of the property. It was agreed that since Jacob had been instrumental in obtaining the $15,000 from Farrell, Conley and Barnes would contribute the $1,000 he was to pay under the original agreement. The $3,000 loan was subsequently repaid to Jacob. (R. 69–70.)

The corporation took title to the hotel property and began its operations on July 1, 1936. Barnes became president and manager of the hotel; Conley, vice-president, keeping the stock records and handling the corporation's legal affairs; and Jacob, secretary-treasurer, with duties of keeping the corporation's books of account, except those kept at Burns under Barnes' supervision, preparing the corporation's income tax returns and handling its tax matters. (R. 70.)

The corporation was organized with a capital stock consisting of 300 shares of non-par value common stock. A certificate for 100 shares of stock was issued to Jacob; certificates for one share, 26½ shares and 72½ shares were issued to Barnes; and certificates for 26½ shares and 73½ shares were issued to Conley. Since one of the conditions upon which Farrell made the loan of $15,000 was that the control of the corporation should be vested in Jacob until the loan was paid, Conley and Barnes endorsed their certificates for 26½ shares each, and delivered them to Jacob to be returned after Farrell had been paid. (R. 71.)

The corporation continued to operate the hotel until July 15, 1937, when the main building, together with all of its contents, was destroyed by fire. Only the boiler room with an apartment above remained. At the time of the fire the corporation carried fire insurance in a total amount of $72,000 on the building and furniture. (R. 71–72.)

Upon learning that the hotel was burning, Conley advised Jacob and they discussed the probable future course of the corporation in the event of a complete destruction of the hotel by fire. Jacob expressed his desire to discontinue his connection with the corporation. Conley went to Burns, Oregon, and Barnes asked him what he and Jacob thought of rebuilding. Conley stated that Jacob wanted "to take his money and get out," but that he, Conley, would join in rebuilding if they could do so without going very heavily into debt. Barnes asked that Jacob and Conley give him their stock in the event that they did not desire to continue. Conley replied that he was agreeable, and when advised of Barnes' request, Jacob also assented. Barnes regarded the corporation as a nuisance but desired to continue its existence because of his belief that corporate financing would be easier than personal financing. (R. 72.)

After Conley's return from Burns, Barnes came to Portland. Barnes wanted to rebuild but Conley and Jacob advised him that they had decided against participation. As a consequence, it was decided to distribute the corporation's assets. Conley and Jacob agreed that they would give their stock in the corporation to Barnes for whatever use he might care to make of the corporation. At the time of the fire the corporation had reduced the state, county and city taxes from $22,000 to approximately $16,000 and the loan from Farrell had also been greatly reduced. (R. 73.)

By August 12, 1937, proceeds of three insurance policies totaling $18,000 had been collected and all debts or liabilities of the corporation, exclusive of taxes, had been paid, including the balance due Farrell. Farrell had been paid either from the insurance proceeds or from a bank loan. A balance of $7,266.32 remained and it was decided that this should be distributed to the stockholders. Since both Barnes and Jacob had received cash in excess of the amount allocable to their stock, payments were made by them to Conley in amounts sufficient to equalize the three parts at $2,422.10. This was accomplished at a meeting of the three on August 12, 1937, at which time each of them signed a receipt to the corporation showing that $2,-422.10, one-third of the above net proceeds of insurance, had been received. The receipts signed by Conley and Barnes were signed, "Jas. L. Conley," and "E. W. Barnes," respectively, while the receipt signed by Jacob was as follows: "R. T. Jacob for Agnes C. Jacob, Gwen Jacob, Shirley Jacob, Beverly Jacob." (R. 73–74.)

A few days later $54,000, due under another insurance policy, was received, and on August 17, 1937, Barnes, Conley, and Jacob met at the First National Bank in Portland and divided the sum, each receiving $18,000. After this distribution the corporation was left with no property or assets except the property upon which the hotel at Burns had stood. The value of that property was not in excess of $10,000, while state, county and city taxes were outstanding against it to the extent of $16,000 or $17,000. The property was later lost to the county in delinquent tax proceedings. As a result of the distribution of the insurance proceeds, the corporation was rendered insolvent and unable to pay its debts. (R. 74.)

At or about the time the corporation was organized, Jacob showed a picture of the hotel to his wife, Agnes

C. Jacob, and his daughters, the taxpayers herein, and told them he was going to give each of them a portion of the stock received by him in the corporation. Shortly after he reiterated that promise and took his wife to Burns to see the hotel, where they stayed for several days. Jacob's reason for having the stock issued to him in his name was that he had promised Farrell that he would retain control of the corporation until Farrell had been repaid. The 100 shares issued in Jacob's name, plus the 26½ shares each issued in the names of Barnes and Conley, and endorsed and delivered to Jacob, constituted 51% of the corporation's outstanding stock. As soon as the Farrell loan was paid, in July, 1937, Jacob returned to Barnes and Conley the certificates received from them, and shortly thereafter he had the 100 shares of stock, standing in his name, reissued in five certificates—one share to himself, 24 to his wife, and 25 each to his three daughters. At the time the certificates were issued, his wife and daughters were at Seaside, Oregon. (R. 199.) He mailed the certificates to his wife requesting that they be endorsed and returned to him. She knew that the certificates received were related to the "Welcome Hotel" and were the shares of stock that Jacob had promised to give to her and his daughters. The shares were endorsed and returned to Jacob within a few days. At no time after the issuance of the 100 shares in his name did Jacob consider that he was the beneficial owner thereof, but at all times considered that his wife and daughters were the beneficial owners. At the time the fire insurance proceeds were distributed by the corporation, the Jacob stock was owned one share by Jacob, 24 shares by his wife, and 25 shares by the three daughters. (R. 75–76.)

Although the name Central Holding Company did not impress itself upon the minds of the taxpayers, they were familiar with the subject matter of the gift and knew that it represented an interest in the Welcome Hotel at Burns. The taxpayers had confidence in and trusted Jacob and believed that he would look after their interest. They had no business experience and anything affecting their business affairs was left entirely to Jacob, the husband and father. (R. 97.)

Jacob retained the certificates endorsed by the taxpayers until final distribution of the insurance proceeds on August 17, 1937, whereupon they were given by him to Barnes. At about the same time, Conley gave his certificates to Barnes and he and Jacob submitted their resignations as directors and officers of the corporation. (R. 76.)

In 1937, Jacob, for these taxpayers, and without consideration, received from the corporation the following amounts, leaving it insolvent and unable to pay its taxes: Agnes C. Jacob, $4,901.30; Shirley Jacob, $5,105.52; Beverly Jacob, $5,105.52; Gwendolyn Jacob, $5,105.52. (R. 92.)

Shortly after the burning of the hotel at Burns, Barnes acquired six lots in Hines, Oregon, on which stood a partially constructed building known as the Hines Hotel. Barnes received title to the property in his own name by two deeds, one dated August 4, 1937, from the the county which had acquired the property for nonpayment of taxes, and the other a quitclaim deed dated July 24, 1937, from a former owner of the property. Barnes conveyed the property to his wife, Olive G. Barnes, by quitclaim deed dated August 4, 1937. The money used by Barnes in making the purchase was part of the $3,000 received by him in the first distribution of insurance proceeds by the corporation. On November 29, 1937, Barnes and his wife conveyed the Hines Hotel property to the Central corporation and about the same time he negotiated the purchase of a hotel in Arlington, Oregon. The purchase price, stated at $50,000, was to be paid by a purchase money mortgage for $24,000, the assumption of accrued taxes of about $5,000, the conveyance of the Hines Hotel and some additional lots at $15,000 (an amount largely in excess of their value), and the remainder in cash which was paid by Barnes out of a portion of the insurance proceeds received by him from the corporation on August 17, 1937. Although title to the Arlington property was taken in the name of the corporation by a deed dated December 15, 1937, Barnes had requested Conley, his attorney in the transaction, to have the property transferred to him before the end of 1937. Conley did not carry out the instructions until September, 1938, when the property was conveyed to Barnes or his wife or both. (R. 76–78.)

The corporation was dissolved on January 6, 1941, by proclamation of the Governor of Oregon and its articles of incorporation revoked for failure, for two consecutive years preceding, to file the statements or pay the license fees required by law. (R. 78.)

Jacob prepared income tax returns for each of his three daughters for the calendar year 1937 showing a net income of $3,958.43, resulting from a sale or exchange in August, 1937, of 25 shares of stock of the corporation acquired in June, 1936. Only 80% of the gain was shown as taxable on the ground that the stock had been held for more than one year, but not over two years. A similar return was filed for Mrs. Jacob, reporting gain on the sale or exchange of 24 shares of stock of the corporation. Jacob's return showed a net income of $23,048.11, including an amount of $15,833.75 as gain resulting from the sale or exchange on August 8, 1937, of 100 shares of stock in the corporation acquired on June 22, 1936. (R. 78–79.)

Attached to Jacob's return was a statement stating that filed concurrently with that return, which included all the profit from the disposition of the stock of the corporation, were separate returns for his wife and three daughters, in each of which was also included proportionate amounts of the same profits. The statement said that it was obvious that the profit is not taxable upon both theories, but due to the many questions presented in connection with gifts, the circumstances require the returning of the income in the several returns. It was stated also that gift tax returns for the year, 1937, were also required by the circumstances, although the gifts "were in fact purported to have been made in 1936." The statement continued that it was his original purpose to make a division of the shares at the time of the incorporation, but the plan was frustrated by conditions imposed by Mr. Farrell. (R. 79–80.) Notwithstanding the exactions of Mr. Farrell, the statement continued that Jacob informed the members "of my family, that I was giving them shares of the corporation's stock." The statement continued (R. 81):

> While this promise was made, it should be pointed out that the stock was in fact neither issued nor delivered to the donees until the latter part of July or the early part of August, 1936, at about the time the mortgage to Mr. Farrell was paid. In this connection, it should also be pointed out that while the certificates were issued and delivered at this time, they were dated as of the date of the original date of incorporation. However, stamps covering two transactions, one from myself to the members of my family and from them to Barnes, were affixed to photostatic copies of said certificates retained by me.

On April 20, 1938, Jacob filed a gift tax return with the Collector of Internal Revenue, showing no tax liability. In this return he reported the gift to Mrs. Jacob of 24 shares of stock of the corporation, and showed love and affection as his motive, and reported the gift to each of his daughters of 25 shares of stock, showing "College Educations" as his motive for making those gifts. An affidavit attached to that return stated, among other things, that it was Jacob's belief that the gifts were in fact made in 1936, but due to the fact that the stock was purchased in that year at a nominal consideration, its value was not sufficient to require the filing of a return in that year, but that should he be mistaken in his position that his gift was not in fact consummated until 1937, then the returns filed with the statement are required. On the same day information returns of gifts, prepared by Jacob for the taxpayers of this case, was filed reporting the gifts to them of the stock in the corporation in 1937. (R. 82–83.)

The revenue agent, investigating the 1937 income tax returns of Jacob and the taxpayers herein in December, 1938, concluded in his reports that the gain on the stock in the corporation was taxable to Jacob, and that Mrs. Jacob and daughters received gifts of the proceeds from the liquidation of the corporation rather than gifts of the stock. Accordingly, he found that the daughters had no tax liability for 1937, and that Mrs. Jacob was entitled to a refund based upon the elimination from her income of the gain on the corporation's stock. The refunds thus recommended, were made by the Commissioner in 1939. (R. 83.)

The corporation adopted a fiscal year ended June 30 upon its organization. Jacob prepared, and Barnes signed and filed, the return for the fiscal year ended June 30, 1937, on September 15 of that year. The return showed net income of $3,681.90 and tax liability of $578.59. Upon audit of this return, the Commissioner determined that the correct net income for the year was $17,768.01 and that there was a deficiency in tax of $5,312.50, and that the corporation was liable for a 50% fraud penalty of the amount of $2,656.25. Barnes had an income tax return prepared for the corporation and filed it with the Collector on September 15, 1938. The return showed a net income of $29,-950.20 as gain resulting from the fire, and a tax liability of $6,007.82. As a result of the audit of the 1938 return, the Commissioner determined that the correct net income was $41,328.53 and that there was a deficiency in tax of $2,974.36. On March 17, 1939, he sent a notice to the corporation advising it of his determination of the above deficiency, whereupon the corporation filed a petition with the Board of Tax Appeals for redetermination of the deficiencies for both years. On March 17, 1939, also, the Commissioner sent notices to Jacob, Conley, Barnes and his wife, advising them of his determination of the above deficiencies and penalties and that he proposed to assess such deficiencies and penalties against them as transferees. Jacob, Conley, Barnes and his wife thereafter filed petitions with the Board alleging error in the Commissioner's determination. (R. 83–84.)

In Jacob's petition, filed June 10, 1939, duly verified before a notary public on June 8, 1939, he stated that prior to the issuance of any shares of stock in the corporation, he had promised to make a gift of the shares to his wife and daughters, that pursuant to the requirements of Farrell, he continued to hold the 100 shares of stock until the loan was repaid, that shortly after the fire, but before repayment of the Farrell loan, he (Jacob), acting on behalf of the taxpayers in this case, entered into an agreement with Barnes whereby the latter agreed to purchase 100 shares of stock which Jacob was holding in trust for the taxpayers for an amount equal to the value thereof as determined by an accounting. That after the payment of the Farrell loan, and in pursuance of his agreement to give stock to taxpayers, he surrendered the certificates for 100 shares of stock in the corporation and caused to be executed and delivered in lieu thereof a certificate for one share to himself, a certificate for 24 shares to the taxpayer, Mrs. Jacob, and certificates for 25 shares to each of the other three taxpayers, and that at the time of the payment of the $18,000, he delivered to Barnes the above mentioned certificates of stock which had been issued to himself and the taxpayers, all of which had been endorsed by the respective owners thereof. The Commissioner in his answer denied the foregoing allegations and affirmatively alleged that at the time of the distribution on August 17, 1937, Jacob was a stockholder in the corporation and that as such stockholder, there was distributed to him on that date, without consideration, cash in the amount of $20,422.10. (R. 85–86.)

The above proceedings came on for hearing before the Board of Tax Appeals on November 29, 1939, at Portland, Oregon. On November 30, 1939, after the introduction of certain evidence respecting the issue of fraud in the case of the corporation, but before the production of evidence as to transferee liability of the other parties, counsel for the corporation, Conley, Barnes and Mrs. Barnes, stated that as a result of conversations between counsel, and while the petitioners in the case did not wish to admit the fraud penalty that for the purpose of closing the case, it was agreed that the Board could enter its decision that there was a deficiency in income tax for the year ended June 30, 1937, in the amount of $2,528.72 and of excess profits of $881.62, and 50% penalties in the amounts of $1,264.36 and $440.81 on the income and excess profits tax, respectively. It was also stipulated that there was a deficiency for the fiscal year ended June 30, 1938, in the sum of $1,875.48 in income taxes and of $1,098.88 in excess profits taxes. (R. 86–87.) Counsel for Jacob stated that Jacob agreed to the stipulation but denied the amount of the deficiency and the liability for the fraud penalty of the transferor, but admitted that he was a transferee. Pursuant to the stipulation, the Board, on December 5, 1939, entered its decision determining deficiencies and penalties against the corporation and transferee liability against Jacob, Conley, Barnes and Mrs. Barnes. (R. 88–89.)

The tax liability of $6,007.82, shown on the corporation's return for the fiscal year ended June 30, 1938, was assessed on October 13, 1938, but no part of it has ever been paid. Notice and demand for the tax was issued by the Collector on October 6, 1938, and a second notice and demand was issued on October 18, 1938. On November 9, 1938, a warrant for distraint was issued and on March 7, 1939, lien was filed with the Clerk of the United States District Court at Portland and with the county clerks of Multnomah County (Portland), Harney County (Burns), and Gilliam County (Condon). Efforts of the Collector to collect the tax have been fruitless. (R. 89.)

On March 1, 1940, the Commissioner filed with the Board in each of the cases of Jacob, Conley, Barnes and Mrs. Barnes, a motion to vacate the decision entered on December 5, 1939, in order that the transferee liability might be increased in an amount equal to the unpaid portion of the original tax shown on the returns of the corporation for the fiscal years involved, plus the amounts shown in the Board's decisions entered on December 5, 1939, which imposed transferee liability only for the amount of the deficiencies assessed by the Commissioner for those tax years. The motions stated that the Commissioner was unaware of the fact that the original taxes had not been paid when the stipulation respecting the transferee liability was entered into, but that fact was known to the parties. On March 4, 1940, the Board vacated its decisions entered on December 5, 1939, and ordered the parties to file briefs in connection with the Commissioner's motion. In addition to filing a brief, Jacob filed an affidavit admitting, at the time of the negotiation of the compromise stipulation of settlement that he and his counsel knew that a portion of the tax shown on the corporation's return for the year ended June 30, 1937, and all of the tax shown on the return for the year ended June 30, 1938, had not been paid, and stated that no inquiry was made by counsel for the Commissioner as to whether such taxes had been paid, and that he assumed counsel for the Commissioner had knowledge of such fact. On April 9, 1940, the Board denied the Commissioner's motions and on April 10, 1940, entered its decisions holding that Jacob, Conley, Barnes and Mrs. Barnes each was liable as transferee of assets of the corporation only for the deficiencies determined in the decision entered in the case of the corporation on December 5, 1939, together with interest as provided by law, which was apparently inadvertently omitted from the decision of that date. Jacob has paid his total liability as transferee as thus determined by the Board. (R. 89–92.)

On April 8, 1941, the Commissioner sent notices to the taxpayers herein, advising them of his proposal to assess against them as transferees of the corporation the amounts involved herein with respect to the unpaid income and excess profits taxes of the corporation for the year ended June 30, 1938. (R. 92.) The Board of Tax Appeals sustained the Commissioner in assessing these taxpayers as transferees. (R. 102–103.)

SUMMARY OF ARGUMENT

I

The Board found that the corporation, the unpaid taxes of which gave rise to the transferee liability here involved, paid liquidating dividends on stock owned by the taxpayers which rendered it insolvent. The dividends were received by the taxpayers' agent for them. The corporation was dissolved before the taxpayers were assessed as transferees. Each of these findings are supported by substantial evidence and are accordingly conclusive here. Together they constitute all the elements necessary to sustain transferee liability.

The receipt of money by an agent under familiar rules is receipt by the principal. Transferee liability is personal, but even were it *in rem,* receipt by an agent is sufficient to impose liability against the principals.

The element of transferee liability that the Commissioner must exhaust his remedies against the transferor, is founded on the fact that transferee liability ought not to be imposed until it is shown that the transferor is unable to satisfy its obligation. It has no application, therefore, where as here the transferor was dissolved before transferee liability was imposed and it was shown that it was insolvent for several years before dissolution. Clearly an idle gesture is not required.

II

Neither the act of the Commissioner in refunding income taxes paid by the taxpayers on the liquidating dividends of the corporation nor the assessment of Robert T. Jacob, as transferee of the corporation, on the theory that he was the owner of the liquidating dividends, the Board here found were in fact owned by the taxpayers, constituted an estoppel or an election. Nor is the refund of the Commissioner or the consent judgment entered against Jacob *res judicata.*

To establish equitable estoppel reliance with detriment upon the alleged activity which estops must be proved. Here it was neither alleged nor proved. Nor could it be since the refund was a tax benefit and the payment of the judgment by Jacob was a *pro tanto* reduction of the transferee liability of the taxpayers.

There must be a judgment of a court of competent jurisdiction before *res judicata* can be successfully invoked. It is plain that the Commissioner's refund is not a judgment by a court. Nor was the consent judgment of the Board *res judicata* for the reasons that neither the same parties nor their privies were involved, and it has been said that a judgment entered on stipulation cannot be *res judicata.*

Finally the Commissioner is not barred by election.

The doctrine is that where the Commissioner has two equal rights against a taxpayer, but he cannot have both, he is bound by the one he chooses. If there were two equal rights with respect to taxing the dividends it is clear that in refunding taxpayers' personal income tax the Commissioner chose to exercise the right which he had against them as transferees. His action in assessing Jacob as a transferee was not an election because he did not have an equal right to proceed against Jacob and the taxpayers as owners of the same fund. It has been correctly held that an erroneous determination of the Commissioner against another not only does not bar the Commissioner, but would not excuse the Board for failure to sustain the Commissioner's position.

ARGUMENT

Central Holding Company (hereinafter referred to as the corporation) filed an income and excess profits tax return for the fiscal year ended June 30, 1938, showing a tax due of $6,007.82. (R. 156.) The liability of the corporation for this tax has not been contested by the taxpayers [2] herein. The Commissioner notified the taxpayers by separate letters dated April 28, 1941, that there would be assessed against them stockholder-transferee liability of the corporation for its unpaid income and excess profits taxes for the fiscal year ended June, 1938, plus interest. (R. 19–20.) On March 17, 1939, the Commissioner had as-

[2] The petitioners will, for convenience, be referred to as "taxpayers" although their status as such arises because of the transferee liability assessed against them rather than any controversy about income or other taxes arising from their earnings.

sessed a deficiency for income and excess profits taxes and a fraud penalty against the corporation for the fiscal year ended June 30, 1937, and a deficiency for income and excess profits taxes for the fiscal year ended June 30, 1938. On the same day the Commissioner sent notices to J. L. Conley, E. W. Barnes and his wife and R. T. Jacob advising them that he proposed to assess the deficiencies and penalties of the corporation against them as transferees. (R. 84.) After petitions to the Board, a judgment for transferee liability was entered on stipulation. Those transferees were never assessed for the tax shown on the face of the corporation's return for the fiscal year ended June, 1938, and the Board refused to enter a judgment against them for the tax shown on the return. (R. 84–92.) It is that unpaid tax of the corporation plus interest for which these taxpayers were assessed as transferees.

Section 311 (a) (1) of the Revenue Act of 1936, *supra,* permits the assessment and collection of an amount from a transferee equal to his liability at law or in equity for a tax imposed on the transferor. That section provides that the liability shall be "assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title." This provision has reference to Section 272 of the Revenue Act of 1936.

Taxpayers' counsel argues from provisions of Section 272 (f), *supra* (Br. 6–10), that the Commissioner is precluded here because he has already assessed a deficiency for transferee liability against others for the unpaid taxes of the corporation for the fiscal year ended June 30, 1938. Section 272 (f) provides in essence that after a deficiency has been assessed and the taxpayer files a petition with the Board "the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year."

Counsel's contention is without merit for at least three reasons. 1. This case does not arise because of a *deficiency* asserted by the Commissioner. The Commissioner asserted *transferee liability* against the taxpayers—not a deficiency. (R. 19–20.) There has been only one deficiency determined in connection with the fiscal year ended June, 1938, taxes of the corporation and that was done by letter dated March 17, 1939, addressed to the corporation. (R. 84.) The notices the Commissioner sent to Conley, Jacob and Barnes, *supra,* were not notices of additional deficiencies, but rather notices of their liability as transferees for the original deficiency of the corporation. And the notices which gave rise to this litigation similarly were not notices of additional deficiencies, but rather notices of imposition of transferee liability for the unpaid tax of the corporation shown on its return. Thus this proceeding is not concerned with a second deficiency asserted against either the corporation or these taxpayers. 2. Moreover, the provision merely prohibits a determination of an additional deficiency against a taxpayer after a petition has been filed with the Board. Thus, even had the Commissioner assessed a deficiency against these taxpayers, there have been no prior deficiencies assessed against each taxpayer here, the situation to which Section 272 (f) refers. That transferees are to be treated as taxpayers is made unmistakably clear by the Conference Report accompanying the Revenue Act of 1926, where the transferee provision first was inserted in the Revenue Laws. The Report stated "* * * for procedural purposes the transferee is treated as a taxpayer should be treated." H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 44 (1939–1 Cum. Bull. (Part 2) 371). The courts have so referred to transferees. See *Phillips* v. *Commissioner,* 42 F. 2d 177 (C. C. A. 2d), affirmed 283 U. S. 589; *United States* v. *Updike,* 281 U. S. 489; *Routzahn* v. *Tyroler,* 36 F. 2d 208 (C. C. A. 6th). It is manifest that there has been no prior deficiency assessed against any of these taxpayers. 3. Finally, the contention of counsel would preclude the Commissioner from following more than one transferee. This result would emasculate the effectiveness of the transferee remedy for if the Commissioner first assessed a transferee against whom satisfaction of the judgment after decision by the Board proved impossible, he would be precluded from proceeding against others. That the Commissioner is free to go against all transferees until satisfaction of the transferor's liability was the underlying assumption of *Phillips-Jones Corp.* v. *Parmley,* 302 U. S. 232. See *Peir* v. *Commissioner,* 96 F. 2d 642, 648–649 (C. C. A. 9th).

I

The Board's findings of fact are supported by substantial evidence and constitute all of the essential elements of transferee liability

Congress, in enacting Section 311 (a) (1) of the Revenue Act of 1936, merely provided another method of determining common law transferee liability. Whether liability exists, however, is ascertained by reference to "the liability, at law or in equity." The components of transferee liability other than that imposed by contract are now well established.[3] It is stated in 9 Mertens, Law of Federal Income Taxation 499 that "these elements are, it will be noted, principally factual; and one thought must be kept in mind * * * transferee liability can be applied only with reference to the particular facts of the case before it * * *.

Thus although there are legal questions to be resolved, these appeals largely involve questions of fact. The taxpayers' brief is predominantly built on a selected and, we believe, distorted view of the facts and the inferences which they draw therefrom. It is

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[3] They are listed in 9 Mertens, Law of Federal Income Taxation 495–499, as follows: (1) The transfer must have been made after the original tax had accrued; (2) the transferor must have been liable; (3) all reasonable efforts must have been made to collect the tax from the original taxpayer, but useless steps will not be required; (4) there must have been a transfer of assets having value to the transferee; (5) the transfer must have left the transferor insolvent and (6) the statute of limitations must not have run. The taxpayers here raise no question concerning the satisfaction of elements 1, 2, and 6.

hardly necessary, however, to remind this Court that "it is the function of the Board, not the Circuit Court of Appeals, to weigh the evidence, to draw inferences from the facts and to choose between conflicting inferences." *Wilmington Trust Co.* v. *Commissioner,* 316 U. S. 164, 168. The taxpayers come here with a heavy burden in view of the limited scope of review on questions of fact for, if the findings below are supported by substantial evidence, they are conclusive here. Nor is this underlying principle of the relationship between the Circuit Courts of Appeals and the Board of Tax Appeals mitigated by the proposition advanced by taxpayers' counsel in specification of error IX (Br. 6, 10–12), that the statute imposes the burden of proof upon the Commissioner to establish every element essential to transferee liability. The burden of proof imposed upon the respondent is merely that of establishing a prima facie case and once sufficient evidence is put in to do so the burden is on the taxpayers to rebut it or suffer a finding against them. *Hutton* v. *Commissioner,* 21 B. T. A. 101, 103, affirmed, 59 F. 2d 66 (C. C. A. 9th). It goes without saying that if there is substantial evidence to support the essential findings, the least that can be said is that a prima facie case has been made.

The prolonged effort of taxpayers' counsel to direct attention to isolated statements often contradicted or impeached and to draw unrestrained inference upon inference constitutes, when viewed most charitably, an astonishing attempt to retry these cases in an appellate court.

A. The stock upon which transferee liability is here predicated was owned by the taxpayer

Ownership is, of course, a mixed question of law and fact. But the legal principles concerning the elements of a gift *inter vivos* are not in dispute; we have no quarrel with the Oregon gift cases counsel cites. Intention and delivery are the two requisites. There is substantial, and in fact, uncontradicted evidence to support the Board of Tax Appeals' finding of the existence of both. The Board stated that the necessary facts were proved by the taxpayer's witness, Jacob "and regardless of any evidence that respondent may have offered". (R. 96.) Jacob testified that when the corporation was organized he promised to give its stock to members of his family and so informed them (R. 182); a certificate for 100 shares was issued to him rather than his family because Robert S. Farrell imposed as a condition of lending $15,000 to the corporation the retention of its control by Jacob (R. 182); after the hotel burned, a certificate of one share in Jacob's name, 25 in Mrs. Jacob's and 25 each in the name of his daughters was prepared, signed by the corporation's president and sent by Jacob to his wife and daughters who endorsed them (R. 183–184); he always considered them the beneficial owners (R. 186). This testimony of the taxpayer's witness concerning his intention to give the stock and the actual delivery of the certificates is confirmed by documentary evidence.[4]

[4] In Commissioner's Exhibit DD (R. 195–201) (Jacob's statement under oath to a revenue agent). Jacob reviewed the circumstances concerning his intention to give the stock and the reason for not immediately doing so. He continued, "Immediately upon

Notwithstanding this and other similarly uncontradicted evidence, counsel asserts that the stock was not owned by these taxpayers. (Br. 11, 15, 17.) He admits certificates in the name of the taxpayers were made out but asserts they were not signed. (Br. 15.) This is contradicted by Commissioner's Exhibits C (R. 120–121), F (R. 122–123) and I (R. 126) all of which show the signature of E. W. Barnes, president, and Robert T. Jacob, secretary. All of them were endorsed in blank by the respective owners. It is contradicted further by Jacob's testimony. (R. 184.) We known of no statement in the record to the contrary.

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the * * * satisfaction of the obligation imposed by the said Farrell, I caused certificates of stock to be issued to the members of my family. They were at the time in Seaside, Oregon, and the certificates after issue were forwarded to them at that place." (R. 199.) Included in the affidavit is the contents of a letter written by Jacob to Barnes on August 17, 1937, in which he states, "Inasmuch as you have acquired the stock of the undersigned, Mrs. Jacob, and the girls, I have no further interest in the Central Holding Company * * *" (R. 200.) In Commissioner's Exhibit EE, also an affidavit, Jacob speaks of his family selling the stock. (R. 209.) Commissioner's Exhibits C, F and I are stock certificates for 25 shares in the name of Beverly Jacob; Shirley Jacob and Gwendolyn Jacob, respectively. (R. 120, 122, 126.) Jacob in his petition under oath to the Board in the transferee case against him of which the Board properly took judicial notice (R. 85) confirmed the above, stating in part "that after the payment of the Farrell loan and in pursuance of his agreement to give stock to Mrs. Jacob and the daughters, he (Jacob) surrendered the certificate for 100 shares of stock in Central and *caused to be executed and delivered* in lieu thereof a certificate for one share to himself, *a certificate for 24 shares to Mrs. Jacob, and certificates for 25 shares to each of the daughters* * * * that at the time of payment of the $18,000 he delivered to Barnes the above mentioned certificates of stock which had been issued to himself, Mrs. Jacob, and the daughters, all of which had been endorsed by the respective *owners* thereof." [Italics supplied.]

Jacob testified (R. 185):

> My reason for not giving my family the money as I intended to give them an interest in a going concern in the form of stock. The question of making them gifts of cash was not within my purpose, and I felt that would be unwise.

Counsel concludes from the above statement that "he [Jacob] intended them to have the stock, but he abandoned that purpose because of the changed conditions". (Br. 17.) Two observations are compelled. (1) If a gift of stock had been made a lack of intention to make a gift of cash received as a dividend on the stock is irrelevant. (2) Jacob clearly did not say, contrary to counsel's assertion, that (a) Jacob did not give the stock or (b) that he ever abandoned an intention to give it. His statement about not intending to give cash is clearly not responsive to the question of whether a stock gift has been made.

B. Receipt by Jacob, as agent for the taxpayers, of the liquidating dividends of the corporation paid on the stock owned by the taxpayers, was receipt by them

1. There can be no question on this record that the Board's finding that the money received by Jacob in two installments was a liquidating dividend of the corporation is supported by substantial evidence. The Board found [5] that (R. 94, 96)—

> * * * Jacob, whether acting for himself or for the petitioners, with Conley decided not to

[5] It is well settled that facts contained in the Board's "opinion" are entitled to the same weight as those in its findings proper. *California Barrel Co.* v. *Commissioner*, 81 F. 2d 190 (C. C. A. 9th); *Insurance & Title Guarantee Co.* v. *Commissioner*, 36 F. 2d 842, 845 (C. C. A. 2d), certiorari denied, 281 U. S. 748.

> continue in the hotel business with Central or otherwise. They could see a most attractive cash profit as the result of the fire and decided to take it out. From the insurance proceeds they paid the debt to Farrell and certain other obligations of Central and then distributed the balance in three parts to the stockholders, leaving Central in an insolvent condition. Barnes had no intention or thought of buying either the Conley or Jacobs [sic] stock. There was simply a division of the available assets, which in this case happened to be cash. Barnes had some idea that if he might control the corporate shell it might be of some use to him in financing the acquisition of another hotel through the use of a portion or all of the money he had received from Central, but it is perfectly plain that he had no intention that Central should own or conduct any hotel business subsequently acquired by him. * * * Barnes took down a pro rata part of the net insurance proceeds just as Conley and Jacob did. On the evidence we think it perfectly clear that the net insurance proceeds were distributed to or for the Central stockholders and no part thereof may be regarded as having been paid for the Jacob or Conley stock by Barnes.

Counsel's elaborate argument to the effect that Jacob sold the taxpayers' stock (Br. 40–56) is without factual support except in the impeached and contradicted testimony of Jacob.

Barnes testified that there were two distributions of the insurance proceeds (R. 156); that Barnes asked Conley and Jacob to give him their stock and they agreed (R. 157); that after the insurance proceeds

Barnes testimony

were distributed, the corporation had no assets except land and the ruined buildings with a fair market value of between $4,000 and $5,000 against which there were unpaid state, county and city taxes of $16,000 (R. 157); the money used to acquire property subsequently taken in the name of the corporation was Barnes' money; he took title in the corporation because of advice given by Jacob that it would save $3,000 in taxes and because Barnes thought corporate financing would be more easily arranged than personal (R. 158–159); Barnes "never purchased any shares from Jacob and he never sold me any" (R. 159); "at the time Jacob turned over the stock certificates to me, I did not pay or promise to pay him anything for them" (R. 159); the $20,400 received by Barnes from the corporation he treated as his own (R. 163); he did not treat it as corporate money, but used the corporation as a name only (R. 164, 168).[6]

James T. Conley, one of the three original stockholders of the corporation, testified that the corporation had left out of the insurance money after paying all bills "about $61,000" which was "divided three ways, $20,422.10 to each of the three stockholders." (R. 128.) Commissioner's Exhibit K consists of three separate receipts dated August 12, 1927. In each,

[6] This testimony is confirmed in part by Petitioner's Exhibit 5, a letter dated January 24, 1928, written by Barnes to Jacob in which he stated: "* * * and if there is any tax to be paid on the $40,000.00 that you and Conley took out of the Company, you sure will have to pay it." (R. 166–167.) Barnes testified that "the $40,000 referred to in the letter must have been the $20,000-odd that Jacob each received and the $20,000-odd that Conley received." (R. 168.)

receipt was respectively acknowledged from Central Holding Company of $2,422.10, "being one-third net proceeds of insurance on hand this date" by James T. Conley, E. W. Barnes and R. T. Jacob for the taxpayers. (R. 129–130.) Conley testified further that long after the surrender of Jacob's certificates he heard the transaction referred to as a sale, but never prior to August 18, 1937; that everybody knew that he [Conley] was giving his stock to Barnes and that Barnes paid no consideration for the stock; that all he knew about the Barnes and Jacob "deal" was that Jacob had told him that Jacob was giving his stock to Barnes and that he saw Jacob give his stock to Barnes; that if there was any consideration he didn't know about it (R. 134); that Jacob, when asked if he would give his stock to Barnes stated he would; Barnes looked on the corporation more or less as a nuisance.

In view of this consistent documentary evidence and testimony of Conley and Barnes, counsel's insistence on overturning the Board's finding is astonishing. It is based solely on the testimony of Jacob, an impeached witness (R. 189–192), which is contradicted at every point by the documentary evidence and the testimony of Barnes and Conley.

2. It has been established, *supra,* that liquidating dividends were received by Jacob on stock owned by these taxpayers. There can be no question that receipt by an agent is receipt by the principal. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 347; *Helvering* v. *Schaupp,* 71 F. 2d 736, 737 (C. C. A.

8th). Counsel claims, however, that Jacob was not an agent and even if he were he received the money as his own and held it adversely. (Br. 10–29.)

What the Board found, however, was "that in all matters business and financial in which these petitioners were interested Jacob acted for them and, not only were they agreeable to his doing this, but they expected it of him. * * * The money received by Jacob from Central was received for these petitioners and not for himself." (R. 101.) There is abundant evidence to support these findings and no evidence to the contrary. For example, there is Commissioner's Exhibit K (R. 129–130) which is a receipt for $2,-422.10 representing one-third of the net insurance proceeds from the corporation signed by Jacob for each of the taxpayers. Counsel objects to its admission in evidence (Br. 29–32) because "There is no evidence that Jacob was agent for petitioners; that he was authorized by them to receive the money *for them;* or that they authorized him to sign the receipt *for them* * * *." (Br. 29.) The objection is plainly not well taken. The agency was proved by numerous uncontradicted statements in the record. Thus, Agnes Jacob, one of the taxpayers herein, testified that (R. 169)—

> My husband [Robert T. Jacob] prepared the statement regarding the stock. He is my legal adviser, and my attorney. He prepared this return. He always prepares it for me. I signed at his request. I asked no questions. I had implicit confidence in his integrity. When signing any document, I usually ask what

> it is. I knew this was my income tax return. I knew that it had something to do with Central stock.

Similarly the testimony of the other taxpayers, Beverly Jacob (R. 119–121), Gwendolyn Jacob (R. 124–126) and Shirley Jacob (R. 121–123) amply supports the Board's inference that the taxpayer's allowed Robert Jacob to handle all their affairs and had complete trust in him even to the point of signing income tax returns and other documents without knowing the reason for so doing.

Counsel relies upon the following statement from 2 Corpus Juris 935 (Br. 31) to prove the receipt inadmissible:

> The declaration of an alleged agent made to a third person in the absence of the alleged principal, which were not brought to his knowledge or ratified by him, *and not supported by other evidence,* are not competent against the alleged principal to prove the fact of his agency; and this rule that denies the competency, as against an alleged principal, of declarations of the alleged agent made to a third person in the absence of the alleged principal *is particularly applicable where the alleged principal denies the agency,* nor are such declarations competent to disprove the agency, or to prove a renewal thereof * * *. [Italics supplied.]

The statement is therefore authority for admission of the receipt to prove the agency, since there is other evidence. And it is to be noted that this it not a case where the alleged principals deny the agency. On the contrary, they affirm it.

3. Counsel next makes another factual contention again against the express finding of the Board and the uncontradicted evidence. He asserts that Jacob "retained, appropriated and used the money as his own, for his own purposes, and *in complete derogation of any right that the petitioners might have had thereto.*" (Br. 17.) Although Jacob undoubtedly had every incentive so to testify, it is significant that he did not. Apparently he could not do so. What he did testify was (R. 185):

> My reason for not giving my family the money as I intended to give them an interest in a going concern in the form of stock. The question of making them gifts of cash was not within my purpose, and I felt that would be unwise.

This is far short of saying that assuming a valid gift of the stock he would none the less retain illegally the money belonging to his family. We have observed, *supra,* that Jacob often referred to the stock and the money as his family's and nowhere does he state the contrary. Moreover, the receipt as an admission against interest by Jacob, is plainly competent evidence on the issue of whether he received the money for his family. [illegible]

4. Counsel argues, however, that even if Jacob received the money for the taxpayers that transferee liability cannot be imposed short of receipt of the cash by the taxpayers since the action is *in rem.* (Br. 12.) The position is not well taken. This Court made that clear in *Hutton* v. *Commissioner, supra,* where a sole stockholder of a corporation, who on its dissolution

petitioners reply to this

received all its assets, was held liable as a transferee, notwithstanding that after the receipt of the corporation's assets and before the assessment of transferee liability, Hutton paid debts of the corporation in excess of the amount of assets he received. This holding is inconsistent with counsel's contention, for if transferee liability were *in rem,* Hutton could not have been held liable after he had transferred the *res.* This Court's result in the *Hutton* case is in accord with the view expressed by others. A commentator has expressed it as follows:[7]

> The liability of the transferee, apart from his subjection to the statutory tax lien mentioned at the beginning of this article, is generally personal. It is true that in case of a fraudulent conveyance the proper remedy is merely to have it set aside by a bill in equity, and for that reason this proceeding has been called a proceeding *in rem,* but even here, in the event that the transferee has dissipated or disposed of the property so that a decree to set aside the conveyance would be either impossible or unpractical, a personal decree will be entered against him.

See also Latham, Liability of Transferees Under the Revenue Act of 1926, 22 Ill. L. Rev. 233, 397 (1927), and *Fairless* v. *Commissioner,* 67 F. 2d 475 (C. C. A. 6th). In the *Fairless* case the assets of the transferor corporation were transferred to a successor corporation in which the alleged transferees received stock. The transferees in that case contended that since all

[7] Rogge, The Transferee Liability of a Delinquent Taxpayer, 27 Mich. L. Rev. 39, 63 (1928).

the assets of the transferor were turned over to the successor, the latter was the transferee against which the deficiency should have been declared. The court said (p. 476): "we find nothing in the statute which limits collection of defaulted taxes owing by a dissolved or abandoned corporation to the transferees of its physical assets. * * *." It is plain that the holding in the *Fairless* case is inconsistent with an *in rem* theory of transferee liability. For although the assets which would constitute the *res* in an *in rem* proceeding were in the possession of a successor corporation, the stockholders of the successor corporation were held liable as transferees notwithstanding that they were only in possession of evidences of the transferred assets in the form of stock rather than the assets themselves.

Even were the liability *in rem,* counsel has not established that this action against these taxpayers who are in receipt of the assets of the corporation through their agent, must fail. Counsel's assumption that it must, is, we submit, unwarranted in light of the familiar principles of agency referred to, *supra.*

C. Since the corporation was rendered insolvent by the payment of the liquidating dividends and was dissolved before the taxpayers were assessed as transferees, an express finding of the Board, that the Commissioner had exhausted the available remedies against the corporation, was unnecessary

The Board found that the payment without consideration of $4,901.30 to Agnes Jacob and $5,105.52 to each of the other three taxpayers left it insolvent and unable to pay its debts. (R. 92.) This finding is amply supported by the uncontradicted evidence.

(R. 128, 157.)[8] The taxpayers were assessed as transferees on April 18, 1941 (R. 92), and the corporation had been dissolved by proclamation of the Governor of Oregon on January 6, 1941, and its articles of incorporation revoked because of failure for two consecutive years preceding to file statements or pay license fees required by law. (R. 78.)

Taxpayers contend that since the Board made no

[8] The record establishes that the only property in the corporation's name after the insurance money was paid was the ruin of the hotel and the land at Burns against which there were outstanding local taxes far in excess of its value (R. 128, 157), and two other hotel properties purchased by Barnes with his own money and transferred to the corporation gratuitously for short periods (R. 137–138, 158). The corporation did not have title to the two hotel properties after September, 1938. (R. 77–78, 138, 161, 165.) The first hotel property, purchased by Barnes, the Board found, was not transferred to the corporation until November 29, 1937 (R. 77, 137), and it was purchased with Barnes' personal money (R. 140, 158). Counsel's contention that the corporation was not insolvent (Br. 65–76) is based on distortion of the testimony. For example, counsel states that $20,422.10 remained in the corporation and he refers to page 128 of the record. At that page Conley testified, "I got $20,422.10, Barnes got a like sum, or at least it was left in the company, and Jacob got $20,422.10." It is apparent that Conley was implying that he did not know what happened to Barnes' money. But Barnes, the one person who knew, testified that he did not set the money aside as belonging to the corporation. (R. 163–164.) He testified also that he used the insurance money to buy hotel property and the money was his own. (R. 158.) It is apparent that Jacob gave Barnes questionable advice on escaping tax liability either through misinformation or in an effort to fasten liability on Barnes, thereby escaping it for himself and family. (R. 142–144, 164–167, 210.) And it is to be noted that Jacob's testimony (R. 204–209) is directly contrary to Conley's and Barnes' on the alleged sales of the Jacob family stock to Barnes, discussed *supra*, a crucial point on whether Jacob and his family were to escape liability. The Board apparently disbelieved the bulk of it.

finding that the Commissioner exhausted his remedies against the corporation, transferee liability cannot be imposed. (Br. 56–72.) They rely on *Commissioner* v. *Wire Wheel Corporation of America,* 46 F. 2d 1013 (C. C. A. 2d), affirming, *per curiam,* 16 B. T. A. 737, 741, and other cases cited at pages 63 and 64 of their brief. In the *Wire Wheel* case the Board relied on the Senate Finance Committee's report accompanying the Revenue Act of 1926. The Board quoted from that report in part as follows (16 B. T. A., p. 742):

> * * * *It is probable that under existing law The Government may proceed in equity by suit against the transferee if the transferor no longer exists (that is, in the case of a corporation, is dissolved,* or in the case of an individual, is dead), *and if the liability of the transferor has not been judicially established by action against the taxpayer before dissolution* or death—*Updike* v. *United States,* decided Circuit Court of Appeals, eighth circuit, December 1, 1925. If, however, the transferee is still in existence the Government must proceed to obtain judgment against the transferor in an action at law and then proceed against the transferee in equity by a creditor's bill to satisfy judgment. * * *
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> It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the act for the enforcement of tax deficiencies. It is not proposed, however, to define or change existing liability. *The section merely provides that if the liability of the*

transferee exists under other law then that liability is to be enforced according to "the new procedure applicable to tax deficiencies." [Italics supplied.]

It is apparent that the principal authority of the leading case upon which counsel relies establishes that here a finding of having exhausted remedies against the corporation is unessential to transferee liability. This result is confirmed by the recognition that the requirement of exhaustion of remedies arises because transferee liability is secondary and it is first necessary to attempt recovery from the original taxpayer but where the taxpayer is a dissolved corporation no action against it is possible. It has, moreover, been expressly held in an undeviating line of decisions that even where the corporation has not been dissolved, transferee liability will be upheld nothwithstanding failure to proceed against the transferor where to do so would have been useless. *Coffee Pot Holding Corp.* v. *Commissioner,* 113 F. 2d 415, 417 (C. C. A. 5th); *United States* v. *Garfunkel,* 52 F. 2d 727, 729 (S. D. N. Y.); *Fairless* v. *Commissioner,* 67 F. 2d 475 (C. C. A. 6th). The proposition was well stated in the *Coffee Pot Holding Corp.* case, as follows (p. 417):

> The Commissioner was not required to have an execution issued and returned nulla bona before pursuing the petitioner on this claim. The law does not require doing a vain and useless thing, and, as the Board properly found that the transfer of these assets by Snell to petitioner rendered him insolvent to the extent that the tax deficiency could not be satisfied by a levy against him, the Commissioner acted within

> his rights in directly proceeding against the transferee. It is even true that the Commissioner, in the absence of insolvency, has the right to enforce the claim against the transferee without first attempting to collect the tax from the transferor. *Hatch* v. *Morosco Holding Co.*, 2 Cir. 50 F. 2d 138; *American Equitable Ass'n* v. *Helvering*, 2 Cir., 68 F. 2d 46; *Helvering* v. *Wheeling Mold & Foundry Co.*, 4 Cir., 71 F. 2d 749.

As pointed out, *supra*, the record establishes that the corporation had no assets after September, 1938, and was dissolved on January 6, 1941. As of April 8, 1941, when these taxpayers were assessed as transferees, any action against the corporation would have been futile. It is thus unnecessary for this Court to consider the competency of the testimony of Robert Ellison, a Deputy Collector (R. 145–153), and the admissibility of the warrant for distraint (R. 145–149), because the issue on which they were offered is irrelevant to liability.[9]

D. Summary

The Board has found that taxpayers received dividends on stock owned by them which rendered the corporation insolvent. The corporation was insolvent and dissolved before assessment of these taxpayers. No question is raised that the corporation owed income taxes, at the time the taxpayers received the dividends,

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[9] Although the requirement that the Commissioner exhaust his remedies against the transferor is satisfied by showing that action immediately before the assessment of the transferee would be unavailing, this record indicates that the Commissioner did not sleep on his rights. (R. 89, 145–153.)

which have never been paid. These findings constitute all the essential elements of transferee liability. They are supported by substantial, and in most instances, uncontradicted evidence.

II

The doctrines of estoppel, *res judicata* and election are not applicable to bar the Commissioner

As a result of Jacob reporting in his 1937 income tax return the $20,422.10 liquidating dividend of the corporation and his filing separate returns for each of the taxpayers reporting their pro rata share of the same income together with a statement relating certain circumstances (R. 79–81), a revenue agent after investigation recommended refunds to the taxpayers which were made by the Commissioner in 1939 (R. 83).

On March 17, 1939, the Commissioner assessed deficiencies including a fraud penalty against the corporation for the fiscal years ended June, 1937, and June, 1938, and transferee liability against Jacob, Conley, Barnes and his wife for the deficiency. (R. 84.) After petitions were filed with the Board and on the second day of hearings, Jacob with the others consented to transferee liability being entered against them. (R. 84–89.) The unpaid tax of the corporation for the fiscal year ended June, 1938, was not, however, satisfied as a result of those transferee proceedings because the Commissioner had not assessed those transferees for the $6,007.82 shown on the corporation's return, but only for the deficiency determined against the corporation. (R. 89–90.) The Commissioner's attempts to reopen the case before the Board to include judgment for the original tax of the corporation were unsuccessful. (R. 89–92.)

1. On the basis of the refund to these taxpayers for the tax paid on the liquidating dividend and the transferee liability entered against Jacob by consent, counsel asserts that the Commissioner is "estopped" to assert transferee liability against these taxpayers. (Br. 32.) It seems too clear to require argument that the Commissioner is not estopped in the equitable sense of that term. There are numerous elements constituting equitable estoppel which must be proved by he who claims it.[10] The conduct alleged to estop must be relied upon by the party claiming estoppel (*Crane* v. *Commissioner,* 68 F. 2d 640 (C. C. A. 1st); *Grouf* v. *State Nat. Bank of St. Louis,* 76 F. 2d 726 (C. C. A. 8th)) and he must in fact act upon it in such a manner as to change his position for the worse. See *Commissioner* v. *New York Trust Co.,* 54 F. 2d 463 (C. C. A. 2d), certiorari denied, 285 U. S. 556; *Helvering* v. *Brooklyn City R. Co.,* 72 F. 2d 274 (C. C. A. 2d). The taxpayers do not here allege, much less have they proved, reliance or detriment. It is impossible to see how an erroneous refund of taxes to the taxpayer or transferee liability against another is in the least detrimental to the taxpayers.

2. Counsel apparently contends that the refund to the taxpayers and the consent judgment of the Board upholding transferee liability against Jacob are *res judicata.* It is clear that the act of the Commissioner in refunding certain of the 1937 income taxes of the

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[10] Mertens, Law of Federal Income Taxation, 599–601.

taxpayers is not *res judicata.* The doctrine or *res judicata* as explained by the Supreme Court in *Southern Pacific Railr'd* v. *United States,* 168 U. S. 1, 48, is that a "right, question or fact distinctly put in issue and directly determined by a *court of competent jurisdiction,* as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies * * *." (Italics supplied.) Certainly a refund by the Commissioner is not a determination by a "court of competent jurisdiction." [11]

It is apparent also that the consent transferee liability [12] determined by the Board against Jacob is not *res judicata* for the reason that the parties are not the same. See *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620; *Southern Pacific Railr'd Co.* v. *United States, supra.* In the prior proceeding Robert T. Jacob was the party. Here the parties are Agnes Jacob, Shirley Jacob, Beverly Jacob and Gwendolyn Jacob. Counsel contends that the *Western Maryland* case is "con-

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[11] See *Union Metal Manufacturing Co.* v. *Commissioner*, 4 B. T. A. 287, and *Canyon Lumber Co.* v. *Commissioner*, 4 B. T. A. 940, where it was held that even the Board of Tax Appeals' decision could not be *res judicata* because under the Revenue Act of 1924 its determinations had no finality. A determination of the Commissioner is an a *fortiori* situation.

[12] The judgment of the Board that counsel contends is *res judicata* was entered on stipulation. (R. 88–89.) But the doctrine is not applicable by reason of an original judgment entered on stipulation. See *Volunteer State Life Insurance Co.* v. *Commissioner*, 35 B. T. A. 491, reversed on other grounds, 110 F. 2d 879 (C. C. A. 6th). There is no judicial process in a Board decision on stipulation since the Board merely approves a settlement of the parties. *United States* v. *Globe Indemnity Co.*, 17 F. Supp. 838 (S. D. N. Y.), affirmed, 94 F. 2d 576 (C. C. A. 2d).

trolling here." (Br. 37.) In that case the parties were a Collector of Internal Revenue and the Western Maryland Railway Company. The issue was whether an amortized proportion of the discount on the sale of bonds issued by two predecessor companies recognized by the taxpayer as its obligations could be deducted by it. The same issue had been previously litigated except that different tax years were involved and the Commissioner of Internal Revenue rather than the Collector was a party. The Court said (p. 623):

> 1. The scope of the estoppel of a judgment[13] depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. * * *

The Court held that the prior action was *res judicata* because the question was the same in each and the parties were the same since the Collector, because he is an inferior agent acting under the Commissioner is in such privity that he is estopped, i. e., the previous judgment was *res judicata*. Certainly the case is not authority for holding that (1) a refund by the Com-

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[13] Estoppel by judgment is synonymous with *res judicata*. Paul, Selected Studies in Federal Taxation (Second Series) 107, 108. It is an entirely different doctrine from equitable estoppel discussed, *supra*.

missioner can be *res judicata* or (2) Robert T. Jacob is a party or privy of the taxpayers here. On the contrary the case recognizes the necessity of a prior action and identical parties or their privies. It is therefore authority for rejecting counsel's contention.

The proposition that there is no principle which prohibits the Commissioner from taking inconsistent positions in cases involving other parties, moreover, has been affirmatively passed upon. *Igleheart* v. *Commissioner,* 77 F. 2d 704 (C. C. A. 5th); *Gwin* v. *Commissioner,* 14 B. T. A. 393, affirmed on this point *sub nom. Lincoln Bank & Trust Co.* v. *Commissioner,* 51 F. 2d 78 (C. C. A. 6th), certiorari denied, 285 U. S. 548; Griswold, Res Judicata in Federal Tax Cases, 46 Yale L. J. 1320, 1345–1347 (1937). In the *Igleheart* case in which the Commissioner contended a trust was established in contemplation of death, the Board refused to take judicial notice of its determination in a prior case in which the Commissioner prevailed in his position that the very trust instrument involved in the subsequent case was not made in contemplation of death. The Circuit Court after pointing out that neither of the parties in his or her executional capacity was involved in the earlier case stated (p. 713):

> The fact, if it was a fact, that in the other case the respondent took a position inconsistent with one taken by him in the instant case would not justify or excuse a failure of the Board of Tax Appeals, or this Court to sustain a correct position taken by the respondent in the instant case. * * *

The position thus expressed must have particular applicability where the prior action of the Commissioner resulted in a benefit to the taxpayers—namely, a reduction of their transferee liability.

3. Counsel apparently relies also on a doctrine of irrevocable election for which he cites *United States* v. *Brown,* 86 F. 2d 798 (C. C. A. 6th). (Br. 37.) Election has been defined as "the choice of one of two rights or things, to each of which the party choosing has an equal right, but both of which he cannot have." 10 Mertens Law of Federal Income Taxation 646. The court in the *Brown* case viewed the principle similarly, 86 F. 2d 798, 799. In that case the Sixth Circuit denied transferee liability where the Board in a prior case which was not appealed upheld a tax on income of the transferees which included the amount of the assets for which transferee liability was imposed. The court said that the taxpayers were liable either as transferees or for a tax on the transferred assets but not both since the transferred assets if they constituted a trust fund for the creditor were not income. The Commissioner by refunding the tax paid on the transferred assets by the taxpayers here involved, did exactly the opposite of what was done in the *Brown* case and that decision is therefore authority for upholding his action in proceeding against the taxpayers as transferees rather than taxing them as recipients of income.

The *Brown* case clearly has no application to the action of the Commissioner in assessing Jacob as a transferee because the statute did not permit an election between holding Jacob as transferee on the one hand and his family on the other as recipients of the same assets. There was not a choice between "one of two rights."

This Court, in *Peir* v. *Commissioner, supra,* rejected a similar contention. In that case the Commissioner had proceeded against a successor corporation and the corporation had paid the tax assessed under protest. The *Peir* case upheld assessment of transferee liability against the president of the transferor corporation, notwithstanding the prior assessment of a successor corporation. The Court there said (p. 649): "The fact that respondent proceeded against Air Reduction did not, we think, amount to an election of remedies preventing assertion of the remedy against petitioners. *Pierce* v. *United States, supra,* 255 U. S. 398, * * *."

The line of cases marked by the *Igleheart* case, *supra,* moreover, demonstrates that an inconsistent approach where different parties are involved is not a bar to the Commissioner.

Finally, these taxpayers have no claim to consideration by this Court on the ground that the Commissioner is acting unjustly or that they have a strong equitable position. Counsel states, for example, that "the Government ought to turn square corners when dealing with its citizens." (Br. 39.) A case where, in light of this record, that admonition is more singularly out of place is difficult to imagine. It suffices for summary to point out that although these taxpayers received a portion of the assets of the corporation which prevented it from paying the tax it admittedly owed, they urge in derogation of their transferee liability an erroneous refund of income taxes which benefited them and a proceeding against another as transferee which to the extent the judgment resulted in a satisfaction of the corporation's tax reduced these taxpayers' liability *pro tanto.*

CONCLUSION

The decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted.

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